DESTRUCTION OF BUILDINGS BY FIRE AS WASTE.

IN THE case of Attersoll *v.* Stevens,[1] the following statement was made:

> "It is common learning, that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed."

This harsh obligation, alleged to rest upon a tenant to replace buildings destroyed or injured by fire, was enunciated by the older authorities and has been frequently restated in more recent cases. But it is so contrary to the notions prevalent among lawyers and laymen in modern times, as to the obligations growing out of the occupancy of an estate less than inheritance in land, that its status to-day as a live legal principle affords a subject for interesting and profitable study. Probably nine well informed landlords out of ten consider that they would have no redress against their tenants for the accidental burning of the buildings on the premises. The tenth, upon consulting his attorney as to his rights, would probably be informed that unless the tenant has been guilty of negligence he would not be liable. If the attorney is correct, how and when has the change been brought about?

This paper will be confined to a discussion of the history and the present status of the liability of the tenant of less than an inheritable estate in land, in the absence of express undertakings touching the matter, to replace structures destroyed or damaged by fire. It will consider only his substantive liability; and the procedural aspects of the case will not be treated.

The fire which causes the injury may originate in one of many ways. It may be caused by agencies clearly beyond the tenant's control, as by lightning or invading armies. It may be caused by the person under whom the tenant holds. It may be caused by the wilful or negligent act of the tenant or his

[1] 1 Taunt. 183 (1808).

servant, by accident, or by the wilful or negligent act of a stranger.

Inconceivable as it may appear to us to-day, a tenant at common law, who was in by act of the parties, was not liable for the manner in which he used the premises, unless made so by express agreement.[2] As a reason for this unusual laxity, it is stated that the parties must have intended that the tenant should not incur any liability with reference to his use of the premises, because they had an opportunity to stipulate with reference thereto in their contract of leasing and did not. Tenants in by act of the law, on the other hand, were charged with the duty to so use the premises that they return to the owner of the fee unimpaired by act or omission of the tenant or any third person. This advantage to the reversioner, after such an estate, was given, because he had had no voice in the creation of the estate and, consequently, no opportunity to protect himself by covenants.

To meet this situation and equalize the obligations of tenants, the Statutes of Marlbridge and Gloucester were passed in 1267 and 1278, respectively, by the terms of which all owners of estates for life or years were made liable for waste.[3] What constituted waste under the statutes was determined by the common law. It was construed to include all injury except that arising through the intervention of the reversioner or through some agency beyond possibility of control by the tenant, *e. g.*, the elements or hostile armies. Thus it included a fire loss originating by accident, by the act or neglect of the tenant or by the act or neglect of a stranger.[4]

Just as it was inequitable to the reversioner to exempt the tenant from all obligation toward the premises at common law, so under the statutes the opposite extreme was reached, and hardship resulted to the tenant in making him practically an insurer

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[2] 2 BLACKSTONE, COM. 282; Countess of Shrewsbury's Case, 5 Coke Rep. 13b. But see Moss Point Lumber Co. *v.* Board of Supervisors, 89 Miss. 448, 42 South. 290 (1906).

[3] 2 BLACKSTONE, COM. 283.

[4] Attersol *v.* Stevens, *supra;* White *v.* Wagner, 4 Harr. & Johns. (Md.) 373 (1818); 4 KENT, COM. 77; 7 BACON, ABR. 269; 22 VINER, ABR. 450; Heydon and Smith's Case, 13 Coke Rep. 69.

of the leased buildings. So harsh was the tenant's situation under the statutes that, after waiting four or five centuries, the legislature passed an act to give him relief. In 1707, 6 Anne c. 31 was enacted, which, supplemented 67 years later by 14 Geo. III c. 78 sec. 86, exempted a tenant from liability for all loss to the leased buildings by fire not caused by his or his servant's wilful or negligent act. In this way it came about in England that a tenant was not liable for accidental fire loss or that caused by a third person under such circumstances as not to charge the tenant with negligence.[5]

Thus, as to this particular feature of the law of waste, it is seen that in England the statutes have definitely settled the rights of the parties. In America, on the other hand, with the numerous courts and legislatures, a settled condition cannot be said to prevail. Most of the states have their individual statutes, conforming more or less closely to the Statutes of Malbridge and Gloucester in making tenants liable for waste; but few have retained the hard features of the Statute of Gloucester. The measure of recovery in most cases is actual damages (unless there are aggravating circumstances, when treble damages may be recovered); but forfeiture of the place wasted as a penalty for waste has generally been discarded. Like their English originals, these statutes are general in terms, simply making certain owners of interests in land liable for waste. What constitutes waste is not defined by the statutes but is left to the common law, or, what is the same thing, the construction placed upon the word "waste" as used by the English statutes. As has been shown, this construction was extremely favorable to the inheritance and harsh toward the tenant, as evidenced by the fact that injuries resulting from accident and the acts of strangers were included in it.

The reason advanced for holding a tenant liable for damage caused by a stranger was that the tenant had an action against the stranger while the reversioner had none, and that to refuse the reversioner the right to recover from the tenant would be to leave him without remedy.[6] This was true at the time the action of waste was first given, but continued true for only a few years; for, seven years after the Statute of Gloucester, West-

[5] 10 BACON, ABR. 430.

[6] Attersoll *v.* Stevens, *supra*.

minster II was passed giving chancery the right to issue writs in certain cases where trespass would not lie, of which this was one. Another and more plausible reason why the tenant was liable even for the acts of strangers it to be found in the sacredness with which the common law regarded lands and the vigor with which it penalized and attempted to prevent injury thereto. The fact that in favoring the land a hardship was thereby being worked on the tenant did not deter it. A third reason for charging the tenant with injury caused by a stranger was that the tenant, being charged by the law with the duty not to commit waste, was considered to be violating the inhibition of the statute by permitting another to do it; for the law presumed that the tenant might withstand it; *et qui non obstat, quod obstare potest, facere videtur.*[7] The tenant could not save himself by showing that he had been vigilant in his care for the property. Precedent for this absolute liability was found in the liability of the carrier of goods and the inn-keeper's obligations with reference to his guests' baggage.

The American statutes of waste then, like their English prototypes, making tenants liable for waste generally without defining waste, left its definition to the common law or adopted the construction placed upon it under the English statutes, which, as shown above, are the same. Therefore, in the absence of a statute performing the office of 6 Anne, it would seem that a tenant would be liable in America for injury caused by a third person or by accident.[8] Since 6 Anne is not a part of our common law, the logic of this position has been recognized to a certain extent by some of our courts and remedied by at least two legislatures.[9] In the vast majority of states, however, there is no statute similar to 6 Anne. The absence of such a statute, in the face of the former broad definition given in England to the tenant's liability for waste, is very significant. It is in accord with modern ideas to relieve the tenant from harsh and unreasonable

[7] Attersoll *v.* Stevens, *supra.*

[8] Sampson *v.* Grogan, 21 R. I. 174, 42 Atl. 712 (1899); Sackett *v.* Sackett, 8 Pick. (Mass.) 309 (1829); 1 LOMAX, DIG. 63.

[9] Statutes giving the tenant relief have been passed in New Jersey and Wisconsin.

obligations. Consequently, if it were considered as law among us that a tenant is liable under our statutes of waste for accidental or other loss of buildings by fire not caused by his act or negligence, there would be upon the statute books of every commonwealth a law expressly negativing such liability.[10] In conformity with this view, it appears that no American case has held a tenant liable for accidental loss by fire.

The independence of the American courts in thus departing from the well established rules for the construction of statutes adopted from other jurisdictions, while in general unwise as tending to obscure the intention of the legislature, is, as applied to the law of waste, neither illogical nor dangerous.[11]

Waste is not like murder, for instance—a thing constant for all places, times and conditions. What would be waste in a country denuded of timber might not be waste in a heavily wooded region without a lumber market.[12] A certain course of husbandry would be adapted to one kind of soil, but unadvisable under different conditions.[13]

Consequently, our courts and legal writers have given frequent expression to the policy that a construction placed upon the word "waste" in England, under the influence of local conditions, will not be controlling here. We shall have to define the term in the light of changed conditions as to tenure, the sacredness with which landed property is viewed, the relative values of cleared and timbered lands, the reduction of trespass on the leased property and general lawlessness by reason of the increased efficiency of police protection, the development of social instinct manifesting itself in a greater respect for the rights of others, and the availability of forms for redressing injuries not in existence at the time waste received its definition.[14]

In the light of the flexibility of the term "waste," it is per-

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[10] 4 KENT, COM. 82; WASHBURN, REAL PROP., 5 ed., 157.

[11] "The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country." 4 KENT, COM. 76.

[12] Findlay *v.* Smith, 6 Munf. (Va.) 134 (1818).

[13] 2 MINOR, INST. 604.

[14] Rogers *v.* Atlantic, G. & P. Co., 213 N. Y. 246, 107 N. E. 661 (1915); Findlay *v.* Smith, *supra;* Sampson *v.* Grogan, *supra.*

fectly reasonable that a modern American court, unfettered by any previous decision of its own, would not adopt the definition growing out of conditions prevailing centuries ago. It was said in a recent case: [15]

> "Whilst the construction given a similar statute in earlier times may have weight, our own statute should be construed according to the social conditions of its time, and should not be controlled by the construction of a statute passed in the thirteenth century."

Under the American statutes, as under the English, there is, of course, no recovery for fire loss caused by act of God, the public enemy or the reversioner. There is a recovery for wilful burning by the tenant, as this is clearly voluntary waste. As seen above, there is no recovery for accidental loss. Strange to say, there is some difference of opinion as to liability for injury caused by the wilful or negligent act of a third person.[16] Just why, in America, the tenant is excused if the fire is accidental and charged if it results from the act of a stranger is difficult to see. In both cases the tenant is equally free from fault. Liability ought to be admitted in both cases or excused in both. The act of a stranger to the injury of a vigilant tenant, as well as to the injury of the reversioner, is, so far as such tenant is concerned, an accident; since the loss occurs without his intention and without his fault. The owner of the injured reversion can recover from the stranger just as well as the tenant can.[17] To hold the tenant liable in the absence of his negligence in connection with the fire caused by the stranger makes the law inconsistent and preserves a harsh feature that is out of harmony with

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[15] Rogers *v.* Atlantic, G. & P. Co., *supra.*

[16] Exempting tenant from liability in such cases: Rogers *v.* Atlantic, G. & P. Co., *supra;* Sampson *v.* Grogan, *supra;* Earle *v.* Arbogast, 180 Pa. St. 409, 36 Atl. 923 (1897). Holding tenant liable in such cases: White *v.* Wagner, *supra;* Fay *v.* Brewer, 3 Pick. (Mass.) 203 (1825); Wood *v.* Griffin, 46 N. H. 230 (1865); Powell *v.* Dayton, etc., R. Co., 16 Ore. 33, 16 Pac. 863 (1888); Cook *v.* Champlain Trans. Co., 1 Denio (N. Y.) 91 (1845). But the last cited case as authority for this proposition was overruled in Rogers *v.* Atlantic, G. & P. Co., *supra.*

[17] Halligan *v.* Chicago & R. I. R. Co., 15 Ill. 558 (1854); 2 MINOR, INST. 623; Va. Code (1904), § 2778.

the modern views of the obligations that should rest upon the lessee by reason of the relation of landlord and tenant.

To-day, insurance of the leased building by the owner for his benefit is practically universal. If the tenant were not negligent, the insurance company upon paying a fire loss to the landlord would have no rights against the tenant. If the tenant were liable to the landlord in the absence of negligence, a recovery by the landlord from the insurance company would inure to the tenant's benefit.[18] Then, in the case of insurance on the property for the landlord's benefit, there is no liability on the tenant for fire loss caused by the act or neglect of a stranger. If he were held liable for such loss in case of no insurance, his liability in a particular case would depend, not upon general principles of law, but upon the business sagacity of the lessor in taking out insurance.

Though in simple justice a tenant ought not to be liable for fire loss caused by a stranger, there is a technical reason why a difference might be made between such loss and that arising purely from accident.

The Statutes of Marlbridge and Gloucester declare a tenant liable who "makes" waste. It was early decided that one "made" waste who permitted it, equally with one who actively engaged in its commission.[19] Lately in England this settled construction has been disturbed, particularly with reference to life tenants.[20]

The American statutes follow more or less closely the original English statutes in fixing liability, substituting generally the word "commit" for "make." In construing these statutes some courts have held that a tenant does not commit waste by failing to do those things necessary to prevent the property's deteriorating in value. In other words, some courts hold a tenant not liable for permissive waste.[21] Most of the courts, however, have

[18] Brough *v.* Higgins, 2 Gratt. (Va.), 409 (1846).

[19] 2 BLACKSTONE, COM. 283; 1 CRUISE, REAL PROP. 256; Woodhouse *v.* Walker, 5 Q. B. D. 404 (1880); Harnett *v.* Maitland, 16 M. & W. 257 (1847); Moore *v.* Townshend, 33 N. J. L. 284 (1869).

[20] In re Parry and Hopkin (1900), 1 Ch. 160; In re Cartwright, L. R., 41 Ch. Div. 532 (1889). But see Yellowly *v.* Gower, 11 Ex. 293.

[21] Sampson *v.* Grogan, *supra;* United States *v.* Bostwick, 94 U. S. 53 (1876).

given expression to the principle, by way of *dictum* mostly, that a tenant is liable for permissive waste.[22]

The distinction between voluntary and permissive waste would seem to be clear cut; but the courts have not found it so. Wilful injury and total inactivity resulting in injury are easy of classification. Loss resulting from negligent activity is classed by some as permissive and by other as voluntary waste.[23] Voluntary waste implies activity—permissive waste, passivity. To define permissive waste as negligent waste is inaccurate. Negligence implies activity—a careless activity. Injury growing out of a failure to act, an omission, neglect as distinguished from negligence, is permissive waste.[24] Negligent waste is voluntary.[25]

Accidental loss is universally classed as permissive waste. Then those courts that exempt a tenant from liability for permissive waste could not consistently fix on him liability for accidental destruction of the premises by fire.

Whether injury by a stranger is permissive or voluntary waste is a question on which the authorities are not in harmony. Wilful injury by a mob has been held to be voluntary waste.[26] An injury to plumbing by a housebreaker has also been held voluntary waste.[27] Here the injury was not accidental. It resulted from active wrong which the tenant, being in possession, was (under the older law) considered to have countenanced—since he did not prevent it—and, having countenanced it, he was liable

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[22] Moore *v.* Townshend, *supra;* Schulting *v.* Schulting, 41 N. J. Eq. 130, 3 Atl. 526 (1896); Brough *v.* Higgins, *supra;* Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205 (1888); Miller *v.* Shields, 55 Ind. 71 (1876); Sherrill *v.* Conner, 107 N. C. 543, 12 S. E. 588 (1890); Roby *v.* Newton, 121 Ga. 679, 49 S. E. 694 (1905); Long *v.* Fitzimmons, 1 Watts & Serg. (Pa.) 530 (1841).

[23] See 2 MINOR, INST. 614; Chalmers *v.* Smith, 152 Mass. 561, 26 N. E. 95 (1891); Beekman *v.* Van Dolsen, 63 Hun. 487, 18 N. Y. Supp. 376 (1892).

[24] 30 AM. & ENG. ENC. L., 2 ed., 237; Regan *v.* Luthy, 16 Daly 413, 11 N. Y. Supp. 709 (1890); Norris *v.* Laws, 150 N. C. 599, 64 S. E. 499 (1909); Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436 (1892).

[25] 30 AM. & ENG. ENC. L., 2 ed., 260; Chalmers *v.* Smith, *supra.*

[26] White *v.* Wagner, *supra.*

[27] Regan *v.* Luthy, *supra.*

for it. Injury resulting from the negligence of a stranger was held not voluntary waste by a recent case and for it the tenant was not liable.[28]

Then, since the fire loss resulting from the wilful act of a stranger may be classed as voluntary waste, and since tenants are everywhere liable for voluntary waste, a difference in liability of the tenant might obtain in such case from that applying to accidental loss. But it seems absurd to say that a tenant commits waste by failing to protect the property from incendiaries. If the tenant is a party to the wrong the establishment of that fact will render him civilly liable. It is unjust to presume that he is a wrongdoer simply because the house he lives in happens to be burned by another. So far as the innocent tenant is concerned, he no more makes or commits waste when a stranger burns his dwelling than when defective wiring is responsible for the fire. His activity only and not that of a third person ought to be considered in determining whether or not he has committed waste.

As stated above, injury arising from negligence of the tenant is more logically classed as voluntary waste. That the tenant for life or years is liable for such injury is universally true.[29] If it were not voluntary waste, then, in those jurisdictions exempting a tenant from liability for permissive waste, a tenant would not be liable for such injury.

The classification of negligent injury becomes important in jurisdictions exempting tenants at will from liability for permissive waste but holding them liable for voluntary waste. In England, a jurisdiction making the above distinction,[30] a tenant at will was held not liable for the negligent burning of the leased buildings, because such waste was considered to be permissive.[31] In a jurisdiction holding a loss resulting from negligent acts of the tenant voluntary waste, there would have been a recovery under the above state of facts. In Massachusetts, a tenant at

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[28] Rogers *v.* Atlantic, G. & P. Co., *supra.*

[29] Robinson *v.* Wheeler, 25 N. Y. 252 (1862); Winfree *v.* Jones, 104 Va. 39, 51 S. E. 153 (1905).

[30] Gibson *v.* Wells, 1 N. R. 290; Yellowly *v.* Gower, *supra.*

[31] Countess of Shrewsbury's Case, *supra.*

will who had negligently injured the buildings on the premises was held liable as for voluntary waste.[32]

In Virginia, the law touching this matter is not settled. Few cases have come up involving the points in discussion. Our opinion as to the law must be based for the most part upon *dicta* and upon the general policy of our decisions and statutes.

A statute [33] makes all tenants, whether for life, years or at will, and others, who commit waste, liable. Under this statute, a tenant is not liable for loss occasioned by the act of God, the public enemy or the reversioner. He is liable for injury resulting from his wilful or negligent acts.[34] The Virginia courts have assumed a rather liberal attitude toward the tenant in applying the law of waste,[35] and would certainly not hold a tenant liable for accidental fire.[36] Though there is in Virginia no statute similar to 6 Anne, it is clear that the legislature does not consider one necessary.[37] It enacted a statute expressly exempting a tenant from a duty to rebuild in case of accidental or other loss by fire, not chargeable to the tenant's negligence, in case he had covenanted to repair.[38] The reason for this statute was the harshness of the earlier construction toward the tenant, in making him liable under his covenant to rebuild structures destroyed by fire regardless of its origin. The statute is silent as to the tenant's liability where he has made no covenant. It is a necessary conclusion, then, that if the legislators had consid-

[32] Chalmers *v.* Smith, *supra.* But see Lothrop *v.* Thayer, 138 Mass. 466 (1885), where it was held that a tenant at will was not liable for negligently setting fire to leased buildings.

[33] Va. Code (1873), ch. 113, § 19.

[34] Moses *v.* Old Dominion, etc., Works, 75 Va. 95 (1880); Winfree *v.* Jones, *supra.*

[35] Findlay *v.* Smith, *supra.*

[36] Moses *v.* Old Dominion, etc., Works, *supra;* Maggort *v.* Hansbarger, 8 Leigh. (Va.) 532 (1837). But see Brough *v.* Higgins, *supra,* where the court said, "By the strict common law rule * * * the tenant is bound to repair, and as the Statute of Anne has not been incorporated in our Code the tenant may be bound to repair the partial injuries from a fire * * *." In this case a tenant, having repaired injuries from an accidental fire, was suing the reversioner, who had collected insurance money, for reimbursement. So the clear cut issue of the tenant's liability for repair was not really up for decision.

[37] 1 LOMAX, DIG. 63.

[38] Va. Code (1904), § 2455.

ered a tenant under obligation to rebuild buildings burned without his negligence, in the absence of express covenant, they would have extended the statute to protect him. Counsel for the landlord in the case of Winfree *v.* Jones,[39] an action against the tenant to charge him with the value of a leased house destroyed by fire, admitted that he could not recover unless he could prove negligence.

There is no decision as to the tenant's liability for the negligent or wilful destructive act of a stranger. In Maggort *v.* Hansbarger,[40] a suit being brought on a promise to "return the said property with all its appurtenances, etc.," after a fire of accidental or incendiary origin, the court held that the loss did not come within the promise. The following strong language is taken from the opinion:

> "Such a risque is scarcely ever contemplated by either party, and the tenant receives no premium for the insurance. Were he asked, at the time of making a contract and giving a fair rent for the property, 'Do you mean, if it is destroyed by fire or tempest, to rebuild or repair it?' he would be startled at the bare question; and the landlord himself, to the same enquiry would unquestionably answer that he expected nothing so unreasonable. To bind him to something so unequal, and so contrary to the obligations imposed upon him by the common law, I think his covenant ought to be special and express, and so clear as to leave no doubt that he intended to take this duty or charge upon himself."

The contractual obligation in this case was certainly as broad as the legal obligation that might be said to be created by the statute of waste. If it were true that the obligation to rebuild in case of accidental or incendiary fire were already imposed upon the tenant by law, why should the parties, as the court intimated, be horrified at the idea of putting that legal obligation into contractual form? From the lenient attitude the court assumed toward the tenant, it is more than probable that, had there been no covenant and had the action been one of waste, the landlord would have been disposed of summarily. The court, being so firmly convinced that the tenant did not intend by his covenant

[39] *Supra.* [40] *Supra.*

to assume the obligation to rebuild in case of accidental or incendiary fire, would certainly not hold him liable in the absence of such covenant. And if not liable for the wilful acts of a stranger, clearly the tenant would not be liable for his negligent acts.

From these authorities it would appear that unless the loss is traceable to the tenant's negligence he is, in Virginia, as in America generally, liable only in case he has expressly and unequivocally assumed such risk.

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